INDEX

	Page
Statement	1
Argument:	
1. There is a plain and adequate remedy at law. An injunction to restrain the collection of the tax was properly denied	3
2. The injunction is one to restrain the collection of taxes	7
Conclusion	11

CITATIONS

Cases:	
Block v. *Hirsh*, 256 U. S. 135	10
Brasier v. *United States*, 229 F. 2d 176, certiorari denied, 351 U. S. 925	6
Brushaber v. *Union Pac. R. R.*, 240 U. S. 1	9
California v. *Latimer*, 305 U. S. 255	4
Carter v. *Carter Coal Co.*, 298 U. S. 238	8
Cotting v. *Kansas City Stock Yards Co. &c.*, 183 U. S. 79	10
Dodge v. *Osborn*, 240 U. S. 118	6
Fontenot v. *Accardo*, 278 Fed. 871	8
Georgia R. Co. v. *Redwine*, 342 U. S. 299	
Hill v. *Wallace*, 259 U. S. 44	8
Hudson v. *Crenshaw*, 224 F. 2d 324	8
Liberis v. *Nee*, 10 F. Supp. 336	8
Lipke v. *Lederer*, 259 U. S. 557	8
Miller v. *Nut Margarine Co.*, 284 U. S. 498	3, 6
Mulford v. *Smith*, 307 U. S. 38	8
Oklahoma Operating Co. v. *Love*, 252 U. S. 331	10
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429	9
Regal Drug Co. v. *Wardell*, 260 U. S. 386	8
State v. *Fifth Judicial District Court*, 36 N. Mex. 151	9
State Railroad Tax Cases, 92 U. S. 575	6
Terrace v. *Thompson*, 263 U. S. 197	10
Tovar v. *Jarecki*, 173 F. 2d 449	8

Cases—Continued Page
United Gas Co. v. *R. R. Comm'n*, 278 U. S. 300..... 6
United States v. *Jacobs*, 306 U. S. 363..... 10
United States v. *Rizzo*, 297 U. S. 530..... 8
Young, Ex parte, 209 U. S. 123..... 10
Statute:
Internal Revenue Code of 1954:
Sec. 5006 (26 U. S. C. 1952 ed., Supp. III, Sec. 5006)..... 2, 4, 9
Sec. 5061 (a) (26 U. S. C. 1952 ed., Supp. III, Sec. 5061 (a))..... 2, 9
Sec. 7421 (26 U. S. C. 1952 ed., Supp. III, Sec. 7421)..... 3

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 775

SCHENLEY DISTILLERS, INC. AND JOSEPH S. FINCH AND COMPANY, APPELLANTS

v.

JOHN H. BINGLER, UNITED STATES DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE PITTSBURGH INTERNAL REVENUE DISTRICT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1, of the Revised Rules of this Court, the appellee moves that the judgment of the District Court be affirmed on the ground that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the final judgment of the District Court, specially constituted under 28 U. S. C., Sections 2282 and 2284, dismissing appellants' complaint and thereby refusing to grant a

permanent injunction to restrain the District Director from determining and collecting the federal tax on distilled spirits. The tax attaches as soon as the distilled spirits are in existence as such but, as to spirits deposited in bonded warehouses, is determined and collected when the spirits are withdrawn from bond but in any event within eight years from the date of original entry for deposit in the bonded warehouse. Internal Revenue Code of 1954, Secs. 5006 (a) (2) and 5061 (a). The complaint alleges that the industry, including appellant Finch, has overproduced and now has distilled spirits in bonded warehouses for which there will be no market at the end of the eight-year deposit period (pars. 23, 37–46); that the requirement that the tax be paid at the end of eight years without regard to the marketability of the distilled spirits is unconstitutional (1) as imposing a direct or property tax without apportionment and (2) as being in violation of due process of law (par. 15); and that the threatened exaction of the tax in the absence of a market will result in irreparable damage to appellant Finch because (1) the cost of paying the tax and holding the spirits for a future market is prohibitive and (2) to avoid the tax it will have to destroy, redistill or export the spirits, all at great loss (pars. 10, 12, 37–52, 63–74).[1]

[1] Appellant Schenley's only interest and concern is that it might become liable on its surety bond of $200,000 if the tax on any distilled spirits deposited in the warehouse of which it is the proprietor is not paid as the law provides and there is no allegation that there is any immediate threat that this will happen. See opinion below, Statement as to Jurisdiction, Appendix A, p. 8 (hereafter referred to as "App. A").

ARGUMENT

The District Court's dismissal of the complaint was based on the ground that the suit is barred by Section 7421 of the Internal Revenue Code of 1954 which, so far as pertinent here, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court". We contend that the District Court's decision is clearly correct and that the questions raised by the appeal in this regard are so unsubstantial as not to need further argument. Consequently, the broad constitutional issues which the appellants seek to raise are not reached in this proceeding.

1. THERE IS A PLAIN AND ADEQUATE REMEDY AT LAW. AN INJUNCTION TO RESTRAIN THE COLLECTION OF THE TAX WAS PROPERLY DENIED.

Section 7421 of the Internal Revenue Code of 1954 provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court". While in some "special and extraordinary circumstances" (*Miller* v. *Nut Margarine Co.*, 284 U. S. 498, 509) injunctive relief has been granted, the present case is one which falls far short of qualifying for the exceptional relief which is being sought.

The District Court concluded that the taxpayer Finch has a remedy at law to test the alleged constitutional invalidity of the tax and consequently held that there was no basis for injunctive relief. The District Court stated (App. A, p. 9), and the appellants do not dispute the correctness of the statement,

that there are no allegations that Finch "could not afford to pay its taxes when due and sue for a refund" and thereby secure judicial determination of the alleged constitutional invalidity of the tax. Indeed, a suit for refund filed by taxpayer Finch is now pending. (App. A, p. 10.)

The appellants' claim that a refund suit is too slow to protect them against alleged irreparable damage and that only a "speedy" injunctive proceeding, with the right to direct appeal to this Court, will suffice (Statement as to Jurisdiction, pp. 29–30), will not withstand analysis. Aside from the fact that a desire for an expeditious judgment is not, of itself, grounds for invoking equitable relief (*California* v. *Latimer,* 305 U. S. 255, 261–262), it is the taxpayer Finch's delay, not the law's delay, which created the dilemma with which Finch is allegedly confronted. The statutory provision complained of (Section 5006, Internal Revenue Code of 1954) is not of recent origin. It has its roots in enactments as far back as 1868 (with a limited exception during the period of National Prohibition). No affirmative reason appears why Finch could not have tested the alleged invalidity of the statute many years ago by way of a refund suit. Moreover, although appellants allege that problems concerning the excess of supply over demand for eight-year old spirits began to be apparent as early as 1952 (Compl., par. 54), it was not until late 1955 that Finch filed its first refund claim (see Deft. Ex. 1). Had there been a prompt suit for refund in 1952, there undoubtedly would have been a final adjudication of the merits of the appellants'

constitutional contentions long before the present injunction proceedings could be finally terminated. The court below, commenting on this fact, said (App. A, p. 10): "No reason for plaintiffs' inaction has been advanced. We are told merely that the delay was due to hope for Congressional relief".

The short of the matter is that, even if it were true that a refund suit is now an inadequate remedy, this is attributable only to Finch's delay in suing for a refund. Accordingly, the extraordinary remedy of an injunction and a direct appeal to this Court cannot now be justified by a claimed necessity for present speed.

Moreover, appellants' allegations of irreparable damage do not in any event suffice to bring this case within the exceptional situations in which injunctions have been permitted. The allegations of irreparable damage have as their basis (1) the facts that Finch has overproduced and has bonded spirits reaching the age of eight years for which there is no market and (2) the high rate of the tax. (See Compl., pars. 10, 12, 13, 31–32, 35, 37–45, 47–52, 63–70.) The allegations are that (1) it is economically prohibitive for Finch to pay the tax and hold its eight-year old bonded spirits for a future market, because the cost of the spirits would increase (due principally to the losses, including taxes, on evaporated whiskey) and that there is no foreseeable market for whiskey having so high a cost (Compl., pars. 10, 47–52) and (2) therefore, to avoid the tax, Finch will have to destroy, redistill or export the spirits, all at great loss (Compl., pars. 63–74). It is alleged (Compl., par. 62) that

"If the tax were exacted only in conjunction with marketing, after eight years as well as before, the industry would have been able to work off the excess production in an orderly way at relatively small increase in cost" because "the increase in the cost of carrying spirits" beyond eight years "is attributable almost entirely to exaction of the tax at eight years".

The damages of which appellants complain will not, however, be attributable to the exaction of an illegal tax; they will arise only if the tax is valid. That is, if the tax is unconstitutional, as is alleged, Finch will be able to recover the tax in its refund suit and no eventual damage from the tax will result. Economic loss may be suffered if the tax is upheld in the refund suit. But, plainly, appellants are not entitled to an injunction to protect them from loss attributable to a *constitutional tax.* See, *e. g., Brasier* v. *United States,* 229 F. 2d 176 (C. A. 10th), certiorari denied, 351 U. S. 925. Consequently, the alleged irreparable losses will not result from "the act [of the District Director] complained of" (*United Gas Co.* v. *R. R. Comm'n,* 278 U. S. 300, 310) and are not "independent of" or "in addition to" the claimed illegality of the tax (*Dodge* v. *Osborn,* 240 U. S. 118, 122; *Miller* v. *Nut Margarine Co., supra,* p. 509; *State Railroad Tax Cases,* 92 U. S. 575, 614), as required to support equity jurisdiction. The allegedly wrongful act of the District Director consists of his threat to collect the tax on bonded spirits at the end of the eight-year bonded period. He is not responsible for the lack of a market for the bonded spirits, which is the primary cause for the alleged losses, and the lack of a market is not in any

event a circumstance independent of the constitutional question.

2. THE INJUNCTION IS ONE TO RESTRAIN THE COLLECTION OF TAXES

In their Statement as to Jurisdiction (pp. 20–24) appellants argue for the first time that the injunction they seek is not one to restrain the collection of taxes. The argument is contrary to the allegations of their complaint. Their prayer for an injunction is grounded on the allegedly wrongful act of the defendant-Director in threatening, under color of his authority under the 1954 Code, "to exact and enforce payment of the said tax" on distilled spirits at the time it reaches the age of eight years in bond. (Compl., par. 24; see also, par. 8.) The complaint consistently refers to the "threat of the exaction of tax" (pars. 12, 45, 90), the "threat of this exaction" (pars. 13, 64), the "threatened exaction" (pars. 23, 33, 62, 63, 66, 70, 94), the "exaction of the tax" (pars. 47, 50, 97, 98) and specifically states that "the relief sought" is a decree permanently enjoining "the determination and exaction of the tax" unless and until the spirits shall be voluntarily withdrawn from bond (par. 16). The prayer is that the defendant-Director and those acting under him be perpetually restrained and enjoined from taking any action in any way looking toward "the determination or collection of any internal revenue tax on any distilled spirits now or hereafter in bond, owned by plaintiffs * * * unless and until the said distilled spirits shall respectively be voluntarily withdrawn from bond". (Compl., p. 38.)

Appellants cite decisions[2] which hold that the statutory prohibition against an injunction to restrain the collection of taxes does not apply to penalties, which, being imposed as punishment, are not taxes. But no question, even unsubstantial, is presented as to whether the tax on distilled spirits is a penalty. It is not a penalty[3] and appellants have not alleged or otherwise contended that it is. Their attack upon the constitutionality of the tax is specifically set out in paragraph 15 of their complaint and is an attack upon the tax as a tax. Therein they allege that, because of the requirement that the tax be paid at the end of eight years without regard to the marketability of the bonded spirits, "the threatened tax is a direct or property tax which, being unapportioned, is beyond the power of Congress" and that in the present situation, where there is no market for all of the eight-year old bonded spirits, the imposition of the tax deprives Finch of due process of law by requiring it to destroy its property in order to avoid payment of the tax.

Appellants' argument that their suit does not seek to interfere with the collection of "tax" is based on assertions that the so-called "force-out" of distilled spirits from bonded warehouses reduces rather than increases the collection of revenue. Such assertions

[2] The reference here is to the following cases cited on page 22 of the Statement as to Jurisdiction: *Hill* v. *Wallace*, 259 U. S. 44; *Mulford* v. *Smith*, 307 U. S. 38; *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Tovar* v. *Jarecki*, 173 F. 2d 449 (C. A. 7th); *Fontenot* v. *Accardo*, 278 Fed. 871 (C. A. 5th); *Liberis* v. *Nee*, 10 F. Supp. 336 (N. D. Fla.)

[3] *United States* v. *Rizzo*, 297 U. S. 530, 533; *Hudson* v. *Crenshaw*, 224 F. 2d 324, 327 (C. A. 4th), and cases therein cited.

assume that the "force-out" is occasioned by a statutory provision separate and distinct from the provisions respecting the imposition and collection of the tax. That assumption is erroneous. As appellants recognize in their complaint (pars. 18, 34), the "force-out" is merely a label for the provisions of Sections 5006 (a) (2) and 5061 (a) of the 1954 Code setting eight years as the maximum time within which the tax on bonded spirits must be determined and paid. Those provisions have relation not only to the time of payment of the tax but to a determination of the amount thereof, as appellants also recognize in their complaint (pars. 18, 34), because the tax is ~~levied~~ collected upon the number of gallons then remaining in the barrels. The determination of the amount of the tax and the time for payment thereof are essential parts of the imposition of the tax. Cf. *State* v. *Fifth Judicial District Court,* 36 N. Mex. 151. In seeking an injunction to restrain the determination and payment of taxes in the manner and at the time prescribed by Congress, appellants are necessarily seeking an injunction to restrain the collection of taxes, as they recognize by the statements in their complaint as to the relief they seek.[4] If appellants are correct in

[4] Appellants seem also to argue (see Statement as to Jurisdiction, p. 23) that the statutory prohibition against an injunction to restrain the collection of taxes is inapplicable in this case because the injunction would only indirectly interfere with the collection of taxes. In that connection reliance is placed upon two decisions (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1) holding that the statutory prohibition is not a bar to a suit by a stockholder to restrain the corporation or its officers from voluntarily paying a tax. Unlike those cases, the present one is a suit against the

asserting that the "force-out" reduces the amount of revenue collected on bonded distilled spirits, that is immaterial. The courts are not concerned with the wisdom of legislation (*United States* v. *Jacobs,* 306 U. S. 363, 371) or with whether it effects the result desired (*Block* v. *Hirsh,* 256 U. S. 135, 158).

Appellants are also wrong in contending (Statement as to Jurisdiction, pp. 30–31) that the situation is one calling for equitable relief because they are confronted with a situation where they must sue for refund "under penalty of huge additional losses if they should prove to be wrong on the merits". The cases cited by appellants (*Cotting* v. *Kansas City Stock Yards Co. &c.,* 183 U. S. 79; *Ex parte Young,* 209 U. S. 123; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331; *Terrace* v. *Thompson,* 263 U. S. 197) all involved situations where the validity of a statute could not be tested in an action at law without incurring a statutory penalty or forfeiture if the validity of the statute was upheld. In those cases the statutory scheme was such as to create the peril and to make an action at law inadequate as a remedy. Here the choice which Finch must make, and any resulting peril of any erroneous choice, does not flow from the statute; it is attributable only to the overproduction of whiskey. Appellants are not entitled to an injunction simply because they made a wrong judgment about the whiskey market. In addition to the fact that the alleged choice is with respect to an economic loss, appellants are not even confronted with the necessity of sustain-

---

District Director charged with the collection of the taxes and therefore seeks directly to interfere with the collection of taxes.

ing a greater loss in order to avail themselves of their remedy at law. Finch, the only one of the two appellants confronted with the alleged choice, has already instituted a suit for refund in which the alleged unconstitutionality of the tax has been raised as an issue.

CONCLUSION

For the foregoing reasons, it is clear that this appeal presents no substantial question and that the judgment of the District Court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
HILBERT P. ZARKY,
MELVA M. GRANEY,
Attorneys.

MARCH 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957